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No. 85-328

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JUDITH WARNICK and CHARLES WARNICK,
Petitioners,

v.

JIN CHA, M.D., INDIANA DEPARTMENT
OF INSURANCE, and DON H. MILLER,
as Commissioner of Insurance
of the State of Indiana,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

PETITIONERS' REPLY

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A

ARGUMENT RE "LAW OF THE CASE"

The Attorney General of Indiana in the Brief filed on behalf of the

Department of Insurance argued that the Indiana Supreme Court:

> "held the act not violative of the federal constitution. This clearly was a federal ground of decision. But the Court also held that Plaintiffs' claims were foreclosed by the Indiana version of the 'law of the case' doctrine." (Resp. Ind. Brf., p. 4).

Cha raised the same argument, contending:

> "The 'law of the case' doctrine designates that an Appellate Court's determination of a legal issue is binding on both the Trial Court and Court of Appeals on a subsequent appeal given the same case and substantially the same facts." (Resp. Cha Brf., p. 28).

> "The petitioner first raised the issue of the unconstitutionality of the Indiana Medical Malpractice Act before the Indiana Court of Appeals. Jin Cha v. Warnick at , 455 N.E. 2d at 109. The Court held that the Act was constitutional. Jin Cha v. Warnick at ____, 455 N.E. 2d at 1167-68. At that point in time, petitioner had ninety (90) days to file a Petition for Writ of Certiorari to the United States Supreme Court. The petitioner failed to do so. Subsequently, the Indiana Supreme Court in Jin Cha v. Warnick at ___,

> 476 N.E. 2d at 114, held that petitioner was bound by the 'law of the case' as determined by the Court of Appeals in the previous default action." (Resp. Cha Brf., pp. 29-30).

Cha v. Warnick appears in 455 N.E. 2d at pages 1165 through 1168, not p. 109. Petitioners address this argument because of possible confusion from the facts or lack thereof recited in Respondents' Briefs.

The Warnicks sued Dr. Cha for medical malpractice in the Lake Circuit Court and after evidence was heard, a $60,000.00 default judgment was entered for the Warnicks, against Cha. No issue of the constitutionality of the Indiana Medical Malpractice Act was presented to the Lake Circuit Court. The Warnicks filed a declaratory judgment action to contest the constitutionality of Indiana's Medical Malpractice Act, which was pending in the Jasper Superior

Court at the time of Cha's Appeal from the **Lake Circuit** Court's $60,000.00 judgment. In the appeal from the $60,000.00 judgment, the Warnicks pointed out in their Brief to the Court of Appeals that a separate action for declaratory judgment contesting the constitutionality of the Malpractice Act was pending in the **Jasper Superior** Court where trial had concluded. The Court of Appeals had refused to stay its determination on such appeal pending a resolution of the declaratory judgment action.

The **Jasper Superior** Court on November 2, 1983, entered judgment declaring the Medical Malpractice Act unconstitutional. Two weeks after the entry of the **Jasper Superior** Court judgment, the Indiana Court of Appeals, in the appeal from the **Lake Circuit**

Court's $60,000.00 default judgment case, set aside the default and gratuitously found the Malpractice Act to be constitutional. The instant Appeal from the Declaratory Judgment procedurally went directly to the Indiana Supreme Court, bypassing the Court of Appeals, since Indiana Rule of Appellate Procedure 4(A)(8), provides:

> "The Supreme Court shall have exclusive jurisdiction of appealable cases where a State or Federal statute has been declared unconstitutional in whole or in part."

The Warnicks contend that Johnson v. St. Vincent Hospital, (1980), 273 Ind. 374, 404 N.E. 2d 585, held the malpractice Act had facia constitutionality while the evidence presented before the Trial Court (Jasper Superior Court) demonstrated, without doubt, that the Indiana Medical Malpractice Act was unconstitutional in

operation. This was precisely what the Supreme Courts of Florida and Pennsylvania had held in Aldana v. Holub, (1980), Fla., 381 So. 2d 231, and Mattos v. Thompson, (1980), 491 Pa. 385, 421 A. 2d 190, which authorities are quoted at some length in the Warnick's Petition herein.

The Court of Appeals in Cha v. Warnick, (1983), Ind. App., 455 N.E. 2d 1165, had before it no evidence or transcript of evidence of the delays inherent in operating under the Indiana Medical Malpractice Act. It was considering an appeal from a default judgment entered in the Lake Circuit Court, not an appeal from a declaratory judgment from a different Court. It, therefore, had no transcript of the evidence in the Jasper Superior Court which established that the Indiana

Medical Malpractice Act is unworkable and that claimants were required to wait years in order for panel opinions to be rendered prior to such claimants being allowed access to the Court system. The facts before the Indiana Court of Appeals, therefore, were not the same, nor similar, to those submitted to the Indiana Supreme Court in the instant appeal. Thus, the application of the "law of the case" theory was not and is not appropriate.

B

STANDING

Cha additionally contends that the Warnicks had no standing to bring this declaratory judgment action. Such issue was resolved in favor of the Warnicks by the Trial Court, which quoting an opinion of this Court held:

"..the court stated the U.S. Constitution standing requirements as follows:

'Gist of the standing question is whether a party has alleged such a personal stake in the outcome of the litigation as to assure the concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends for elimination of the constitutional question.' Baker v. Carr (1962) 369 U.S. 186, 82 Sup. Ct. 691, 7 Lawyers Ed. 2, 663 at 645.

For the purpose of the herein litigation, the plaintiffs have been injured because of the fact they must wait for the finding of the Medical Review Panel before filing a complaint with a court rather than immediately pursuing their cause of action in the court." (Pet. Appendix, pp. 39A-40A).

The $60,000.00 judgment entered in favor of the Warnicks has been set aside because of the application of the section of the Indiana Malpractice Act which restricts access to the courts until an opinion is first rendered by a Medical Review Panel. IC 16-9.5-9-2.

The Warnicks, thus, did and do have standing to bring this declaratory judgment action contesting the constitutionality of such restrictions as found by the Trial Court.

For the foregoing reasons, as well as those urged in the Warnick's Petition, certiorari should be granted.

Respectfully submitted,

Lester F. Murphy
Attorney for Petitioners